



Comptroller General
of the United States

Washington, D.C. 20548

314:32

Decision

Matter of: Harris Corporation Broadcast Division

File: B-255302

Date: February 10, 1994

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DIGEST

1. The inadvertent disclosure to the protester during discussions that the awardee was also in the competitive range did not inform the protester that the awardee had been determined to satisfy a statutory domestic content restriction or mandatory qualification criteria contained in the solicitation, such that the protester was required to protest the awardee's alleged noncompliance within 10 working days of the disclosure; a protest of these matters filed within 10 working days of the date the protester learned of the award (which was the earliest date on which the protester learned that the awardee was considered eligible for award) is timely under General Accounting Office's Bid Protest Regulations.

2. The procuring agency reasonably accepted the awardee's certification and worksheets as establishing compliance with domestic content restrictions of the Foreign Relations Authorization Act in the absence of information indicating that the certification or worksheets are inaccurate.

3. In a negotiated procurement in which lowest evaluated price became the basis for award, protest that the awardee is not entitled to a statutory domestic price evaluation preference is denied, where the record shows that neither the awardee nor the protester was accorded such a preference and where even if the protester was accorded the price preference, and the awardee was not, the protester's price would not be lower than the awardee's.

4. The procuring agency reasonably considered the experience of the awardee's proposed subcontractor and an affiliated corporation in determining that the awardee satisfied a definitive responsibility criterion, where the solicitation did not restrict the satisfaction of the particular experience requirement to only the prime contractor's experience.

5. The procuring agency was not required to inform the protester during discussions that its price was too high, where the protester's price, which was less than the government estimate, was found fair and reasonable.

DECISION

Harris Corporation Broadcast Division protests the award of a contract to ABB Technology Company,¹ under request for proposals (RFP) No. IA2102-S3234361, issued by the United States Information Agency (USIA) for a medium wave radio transmitter and supporting facilities in Germany. Harris contends that USIA's award is inconsistent with the domestic content restrictions contained in the Foreign Relations Authorization Act and that USIA's determination that ABB satisfied the RFP's mandatory qualification requirements was unreasonable.

We deny the protest.²

The RFP contemplated the award of a firm, fixed-price contract to furnish and install a fully solid-state 300 kilowatt (kw), medium wave transmitter at USIA's Voice of America radio relay station in Munich, Germany. The solicitation listed technical evaluation criteria, which were stated to be of equal importance with price, and provided for an award on a best value basis. In addition,

¹ABB Technology Company is a division of ABB Turbocharger and Technology, Inc., a wholly owned domestic subsidiary of Asea Brown Boveri, Inc., a wholly owned domestic subsidiary of Asea Brown Boveri, Ltd of Switzerland. Asea Brown Boveri, Ltd. of Switzerland operates as a holding company for a worldwide group of affiliated companies.

²Portions of the protest record are subject to a General Accounting Office protective order, to which protester's counsel has been admitted. Our decision is based upon protected, confidential information and is necessarily general.

the RFP identified the following "mandatory critical criteria":

"(1) Offerors must currently have the capability to produce a fully solid state 300 kw transmitter with an operating efficiency of 80 [percent] or higher.

"(2) Offerors must have either: 5 years experience producing fully solid state medium wave transmitters at power levels of 50 kw or higher; or 10 years experience producing medium wave transmitters at power levels of 100 kw or higher." [Emphasis in original.]

The RFP also stated that the contractor would be required to perform at least 20 percent of the contract work with its own organization.

Offerors were informed that the procurement was subject to a domestic goods and services content restriction, contained in the Foreign Relations Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 403, 101 Stat. 1381 (1987), which provides in pertinent part:

"A bid shall not be treated as a responsive bid for purposes of the facilities modernization program of the Voice of America unless the bidder can establish that the United States goods and services content, excluding consulting and management fees, of his proposal and the resulting contract will not be less than 55 percent of the value of his proposal and the resulting total contract."

To implement this statutory requirement, the RFP provided that offerors certify, by submission of their proposals, that their offers satisfied the Act's domestic goods and services content requirements. In addition, worksheets were provided that offerors were to complete and submit with their proposals, demonstrating their domestic goods and services content percentage. Offerors were informed that the contractor could make no changes to the content or in the place of manufacture of goods and services as stated in the worksheets submitted with offers, which would reduce the United States goods and services content below 55 percent of the value of the contract, and that a "[p]ost-award failure to adhere to the statutory goods and services content requirements may result in rejection of foreign goods and services."

Finally, the Foreign Relations Authorization Act and the RFP provide for a 10 percent price evaluation preference for "United States persons and qualified United States joint venture persons."³

Proposals were received from three offerors, including Harris and ABB. USIA determined that only the offers of Harris and ABB were in the competitive range. Regarding the "mandatory critical criteria," USIA found that ABB satisfied the current capability requirement through its use of a subcontractor who has this capability, and satisfied the definitive responsibility criterion of 10 years experience producing medium wave transmitters at power levels of 100 kw or greater through its use of an affiliated corporation and a subcontractor.⁴ Discussions were conducted with Harris and ABB, and best and final offers (BAFO) received. ABB's and Harris's proposals were evaluated as being technically equal, and thus, low price became the basis for award. ABB's and Harris's BAFO prices were as follows:⁵

ABB	\$1.57 million
Harris	\$2.24 million

Award was made to ABB on September 30, 1993. Harris protests that ABB is not eligible for award because the awardee did not establish that its proposal satisfied the domestic goods and services content requirements. Harris also argues that ABB did not satisfy either of the "mandatory critical criteria" identified in the solicitation.

³The term "United States person" is defined in the Act to mean a person that:

"has been incorporated or otherwise legally organized in the United States for more than 5 years before the issuance date of the [solicitation for] a modernization project" and "has the existing technical and financial resources in the United States to perform the contract."

⁴We consider the identity of Harris's subcontractors and affiliated corporations to be confidential information.

⁵Both firms' BAFO prices were below the government's price estimate, and determined to be fair and reasonable. The contracting officer did not determine whether either offeror was a "United States person" entitled to the 10 percent price evaluation preference or consider the preference in the price evaluation.

USIA first contends that Harris's protest allegations concerning ABB's eligibility for award and ABB's satisfaction of the "mandatory critical criteria" are untimely and should be dismissed. USIA states that on July 29, 1993, during written discussions, the agency inadvertently sent Harris several questions intended for ABB that informed Harris that ABB was in the competitive range. In USIA's view, this placed Harris on notice that the agency had determined that ABB was eligible for award and satisfied all the mandatory critical criteria. The agency therefore argues that Harris's October 7 protest is untimely with regard to these contentions because they were not protested within 10 working days of July 29, the date that Harris allegedly should have discerned that ABB was considered qualified.⁶ See 4 C.F.R. § 21.2(a)(2) (1993).

We do not agree with the agency that Harris knew the basis of its protest allegations upon receipt of the discussion questions intended for ABB. While it is true that the questions informed Harris that ABB had been determined to be within the competitive range, the questions did not indicate that the agency had determined that ABB was eligible for award or that ABB satisfied the mandatory critical criteria. In fact, the agency could include in the competitive range an offeror, which the agency had not yet determined to be eligible for award or to have satisfied the mandatory critical criteria, in order to obtain further information bearing on these matters. Accordingly, we find that receipt of questions intended for ABB did not provide Harris with the basis for its protest allegations, and that Harris could await the agency's September 30 award notice that informed Harris that ABB had been determined to be eligible and to have satisfied the mandatory criteria; a protester need not protest until it has notice that an agency is intending action that the protester believes to be incorrect and inimical to its interests. See Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23.

USIA states next, in response to Harris's contention that ABB is not eligible for award, that the agency had no reason to question ABB's certification of domestic goods and services content, as supported by the firm's proposal

⁶The agency also notes that Harris relies in its protest upon a Dun & Bradstreet, Inc. (D&B) report concerning ABB and that Harris obtained this report on September 21, 1993. USIA argues that this also shows that Harris knew the basis of its protest more than 10 working days before the date it filed its protest with our Office. The protester explains, however, that the D&B report was obtained in connection with Harris's credit investigation relating to the unrelated sale of audio equipment by Harris to ABB.

worksheets. Harris replies that the agency could not simply accept the awardee's certification of compliance, as accompanied by ABB's worksheets, because the Foreign Relations Authorization Act requires offerors to "establish" their domestic content. Harris argues that the RFP's worksheets do not request sufficient detail to allow the agency to verify that ABB's purported percentage of domestic goods and services was accurate.'

We find no basis to question the agency's implementation of the statutory requirements in the solicitation, which provided that offerors would "establish" their compliance with the domestic content requirements by their certifications and worksheets. The Act is silent concerning how compliance with the domestic content requirements is to be established, and USIA explains that obtaining certifications of compliance and proposal worksheets has been its implementation of this aspect of the Foreign Relations Authorization Act since 1988. While Harris asserts that the Act requires the agency to investigate offerors' representations of compliance with the domestic content requirements, it has not shown that USIA's implementation of the statutory requirements is unreasonable or inconsistent with congressional intent. See Florida Professional Review Org., Inc.--Advisory Opinion, B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ ____.

Harris argues that USIA could not reasonably accept ABB's certification and worksheets as establishing ABB's compliance with the domestic content requirements because ABB's proposal demonstrates that it may not satisfy these requirements. Specifically, Harris argues that ABB proposed to perform some of the contract work with an affiliated corporation, which ABB assertedly intends to sell to its foreign subcontractor. Harris also contends that ABB's proposal, while stating that the majority of the electronic components will be fabricated by a domestic subcontractor, also indicates that if there is a problem with providing the subcontractor's units within the required schedule, ABB would provide similar components from a French company until the domestic subcontractor could provide the required components, which would then be substituted for the French components.

An agency may reasonably rely upon an offeror's certification of compliance with domestic content restrictions in the absence of information indicating that

'The RFP's worksheets requested that offerors provide their total prices for domestic and foreign goods and services and to state a total percentage of domestic to foreign goods and services content.

the certification is inaccurate. Compare E.D.I., Inc., B-251750; B-252128, May 4, 1993, 93-1 CPD ¶ 364 (reasonable reliance on awardees' certification of compliance with Trade Agreements Act restrictions, in the absence of information indicating that representations were inaccurate) with SeaBeam Instruments, Inc., B-253129, Aug. 19, 1993, 93-2 CPD ¶ 106 (certification of compliance with Appropriations Act domestic manufacture restriction may not be accepted where the proposal suggests noncompliance).

Here, we find reasonable the agency's acceptance of ABB's certification and worksheets as establishing compliance with the 55 percent domestic content requirement. The future sale of ABB's affiliated corporation to another foreign corporation should not affect the domestic content of ABB's proposal because the services to be provided by the affiliated corporation were already identified in the proposal as foreign.⁸ Additionally, USIA recognized in its evaluation that ABB stated in its BAFO that in the "unlikely event" that its domestic subcontractor could not provide the electronic components within the required schedule, it would temporarily provide electronic components from a French company, which would later be replaced by the components of its domestic subcontractor. Despite providing for this contingency, ABB remained committed to providing domestic components, and the agency ultimately concluded, reasonably we think, that ABB's contingency plan did not demonstrate that ABB's certification of compliance with the domestic content requirements and worksheets were inaccurate. Thus, the agency reasonably found ABB's proposal complied with the domestic content restriction of the Foreign Relations Authorization Act.

Harris also complains that ABB is not a "United States person," as defined by the Act, entitled to the 10 percent price evaluation preference. The record shows, however, that neither ABB nor Harris was afforded the statutory price evaluation preference. In any event, ABB's price advantage is so great that, even if Harris received the price evaluation preference and ABB did not, ABB's proposed price would be \$437,883 lower than Harris's. Thus, Harris was not prejudiced by the agency's failure to apply a price evaluation preference. See Aero Realty Co., B-250985, Mar. 2, 1993, 93-1 CPD ¶ 191.

Harris next protests that ABB does not satisfy the "mandatory critical" criterion that offerors have 10 years experience producing medium wave transmitters at power levels of 100 kw or higher. USIA determined that ABB satisfied the criterion based upon the considerable

⁸The affiliated corporation is itself a foreign corporation.

experience of a related subsidiary corporation and a subcontractor. Harris argues that AEB itself does not satisfy the experience requirement and that "[a]n inexperienced contractor cannot qualify himself to perform a contract simply by proposing to use experienced subcontractors."

The requirement that offerors have 10 years experience producing medium wave transmitters at power levels of 100 kw or higher is a definitive responsibility criterion. Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform the contract; the criteria limit the class of contractors to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance, e.g., unusual expertise or specialized facilities. Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398. Contrary to Harris's contentions, the experience of a technically qualified subcontractor generally may be used to satisfy definitive responsibility criteria related to experience for a prime contractor. See Gelco Servs., Inc., B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163, recon. denied, B-253376.2, Oct. 27, 1993, 93-2 CPD ¶ 261; Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, Feb. 8, 1989, 89-1 CPD ¶ 128. Similarly, the experience of affiliated corporations may be relied upon to satisfy an offeror's experience requirements. See Hardie-Tynes Mfg. Co., 69 Comp. Gen. 359 (1990), 90-1 CPD ¶ 347.

Here, there is no suggestion in the RFP that subcontractor's or affiliate's experience cannot be used to satisfy this criterion. To the contrary, the RFP allows the contractor to subcontract all but 20 percent of the contract work, and does not provide any restrictions as to what work can be subcontracted. Accordingly, we think that the definitive responsibility criterion was reasonably found satisfied by the more than 20 years of experience of ABB's subcontractor and a related ABB subsidiary corporation (who with ABB's subcontractor will fabricate the transmitter) that have produced medium wave transmitters at power levels of greater than 100 kw.

Harris also protests that ABB does not satisfy the "mandatory critical" criterion that offerors have the current capability to produce a solid state 300 kw transmitter with an operating efficiency of 80 percent or higher and that the agency improperly relied upon ABB's subcontractor's experience to find ABB satisfied

this requirement.⁹ Here, too, we see no reason why subcontractor experience cannot be considered to satisfy this criterion. Based on our review, we find the agency reasonably determined that ABB's subcontractor's extensive experience and current contract to provide 300 kw transmitters demonstrated the subcontractor's, and thus ABB's, current capability to provide the required transmitter.

Harris finally complains that USIA did not inform Harris during discussions that USIA considered the protester's price to be too high. Agencies are prohibited from advising an offeror of its relative price or cost standing to other offerors, Federal Acquisition Regulation § 15.610(e)(2)(ii), and are not required to point out that a proposed price is too high if the price is still below the government estimate. Mikalix & Co., 70 Comp. Gen. 545 (1991), 91-1 CPD ¶ 527. Thus the agency appropriately did not advise Harris that its price was high.

The protest is denied.

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Acting General Counsel

⁹We do not regard this requirement, which does not set forth an objective standard to be met, as a definitive responsibility criterion.